

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TAYLON JEROME ORR,

Petitioner,

v.

JAMES A. YATES, Warden,

Respondent.

Case No. 11-cv-04923-JST (PR)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
DENYING CERTIFICATE OF
APPEALABILITY**

Before the Court is the above-titled petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 by petitioner, Taylon Jerome Orr, challenging the validity of a judgment obtained against him in state court. Respondent has filed an answer to the petition. Petitioner has filed a traverse.

I. PROCEDURAL HISTORY

On December 12, 2007, a Santa Clara County jury found petitioner guilty of one count of first degree burglary and one count of receiving stolen property. (Ex. A at 388-91.) Petitioner admitted the prior conviction allegations. (Id. at 393.) On March 28, 2008, the trial court sentenced petitioner to a term of sixty years to life. (Id. at 494-96.)

Petitioner directly appealed the judgment in the California Court of Appeal. On June 25, 2009, in a reasoned opinion, the California Court of Appeal affirmed the judgment. (Ex. F.) On September 11, 2009, the California Supreme Court summarily denied the petition for review. (Ex. H.) On May 5, 2010, petitioner filed a state petition for writ of habeas corpus in the California Supreme Court. (Ex. I.) On November 23, 2010, the California Supreme Court denied the petition. (Ex. J.) Petitioner thereafter filed two more unsuccessful petitions to the California Supreme Court. The instant petition was filed on October 5, 2011.

II. STATEMENT OF FACTS

The following background facts describing the crime and evidence presented at trial are from the opinion of the California Court of Appeal:¹

Simon Mai went out to dinner with his wife the evening of September 2, 2006. Before he left, he put their Chihuahua outside. When they returned, entering through the garage, the dog was inside the house. A sofa was blocking the front door and the sliding glass door and metal security gate to the backyard were open with the lock damaged. His television, a camera, a notebook computer, a blanket, and some cash were missing and drawers and jewelry boxes were open.

San Jose Police Officer Michael Chan responded to Mai's 911 call. Checking for latent fingerprints, he could see a partial hand print on the glass top of the table that had held the television. Using fingerprint powder, a fingerprint brush, and tape he lifted a partial hand print. A fingerprint expert testified that appellant's palm print matched this print. She said that two other fingerprint examiners had come to the same conclusion. She also testified that it was impossible to determine the age of the print from the image that she had received.

Ina Wurth testified that she was gone from her home from 2:00 p.m. until about 9:00 p.m. on January 4, 2007. When she arrived home, she found that the inside chain was in place preventing her from entering her front door. She called the police and stuck her hand around the door to remove the chain. When she entered, she noticed "The blinds were askew and cold air." The window next to her sliding glass door was broken. Her laptop computer was missing, as well as a lock box, jewelry boxes, an "itty-bitty white book light," and two pillow cases. A friend's backpack containing a laptop computer, some charger cables, and wrist guard were also missing. Wurth prepared a very detailed inventory of the missing items from records that she had kept.

Kim Sheffield left home with his wife around 2:00 p.m. January 6, 2007. Returning home around 6:00 p.m., they found the back sliding door and bedroom window wide open. Missing were two laptop computers, jewelry, a digital camera, a photo printer, a cell phone, an iPod, and a pillow case.

On January 15, 2007, a San Jose police officer saw appellant leaning into the back door of his Jeep Cherokee. Knowing that there was an outstanding arrest warrant for appellant, the officer arrested him. Inside the Jeep, the police found Sheffield's cell phone and Wurth's friend's laptop computer, as well as a video camera, two more cell phones, and another laptop computer. Police officers with a search warrant came to appellant's home June 12, 2007. In the home, they found a book light, a pillow case, and a wrist guard similar to those taken from Wurth's home. A copy of the list of stolen property that Wurth had prepared was in the living room. They also found a photo printer similar to that taken from

¹ This summary is presumed correct. Hernandez v. Small, 282 F.3d 1132, 1135 n.1 (9th Cir. 2002); 28 U.S.C. § 2254(e)(1).

1 the Sheffield's home.

2 Appellant presented an alibi defense to the Mai burglary charge. Sixteen-year-old
3 Jennavee Simon testified that appellant was her aunt Stacey Robinson's boyfriend. She
4 remembered September 2, 2006, because she was a cheerleader at a football game in
5 Morgan Hill that day. Appellant and Stacey Robinson took her to the game, arriving
6 around 3:00 p.m. She saw appellant in the stands during the game. Simon remembered
7 that her aunt got into an altercation with Vanessa Reyes during the game. Afterwards,
8 appellant, Stacey Robinson, and she went to Mountain Mike's Pizza. They were at
9 Mountain Mike's from around 7:00 p.m. until 8:45 when appellant and Stacey Robinson
10 dropped her and her cousins off at her mother's house.

11 Simon testified that when an investigator called her on June 25, 2007, she remembered
12 "right off the top of [her] head," without consulting a calendar, that she was with appellant
13 and Stacey Robinson on the night of September 2, 2006, at the Morgan Hill game. She
14 was unable to remember the dates of other games.

15 Linda Robinson testified that on September 2, 2006 she awoke with an asthma attack. She
16 called her daughter, Stacey Robinson, to ask her to take Simon and some other
17 cheerleaders to the game. Appellant and Stacey Robinson came and picked up the children
18 and returned them around 9:00 p.m. that night.

19 Kristen "Keri" Solorio testified that she coached Pop Warner cheerleading and that she
20 knew appellant because his girlfriend was the mother of one of her cheerleaders. She
21 remembered the game on September 2 because there was "an altercation on the field"
22 between Stacy Robinson and Vanessa Reyes. She remembered seeing appellant "trying to
23 get [Stacey] to back off."

24 Kathy Robinson testified that she was the president of Oak Grove Youth Football and head
25 coach of two cheerleading teams. She remembered September 2, 2006, because Stacey
26 Robinson and Vanessa Reyes "got into an altercation, verbal altercation, yelling and
27 screaming at one another." She asked appellant to take Stacey away a little after 5:00 p.m.
28 After the game, she went to Mountain Mike's Pizza parlor. On the way there, she
witnessed a traffic accident between a white van and a green car on Blossom Hill. When
she arrived at Mountain Mike's, there was much discussion of this accident. Robinson
testified that she remembered seeing appellant at Mountain Mike's around 7:30 p.m. She
thanked him for helping out earlier. She remembered him staying for the entire time that
the group was there, which was until around 9:30 p.m. Although she testified that Linda
Robinson was sick that day, she may have told an investigator that Robinson had been
present at dinner.

The prosecutor called as a rebuttal witness a San Jose Police Officer who testified that he
was called to investigate a traffic accident on Blossom Hill on September 24, 2006, around
6:45 p.m., between a silver Honda Civic and a white Toyota Sequoia.

People v. Orr, No. H032806, 2009 WL 1816665, *1-2 (Cal. Ct. App. June 25, 2009).

III. DISCUSSION

A. Standard of Review

This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Additionally, habeas relief is warranted only if the constitutional error at issue had a “substantial and injurious effect or influence in determining the jury’s verdict.” Penry v. Johnson, 532 U.S. 782, 795 (2001) (internal citation omitted).

A state court decision is “contrary to” clearly established Supreme Court precedent if it “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases,” or if it “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent.” Williams, 529 U.S. at 405-06. “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Id. at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411.

Section 2254(d)(1) restricts the source of clearly established law to the Supreme Court’s jurisprudence. “[C]learly established Federal law, as determined by the Supreme Court of the United States” refers to “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions

as of the time of the relevant state-court decision.” Williams, 529 U.S. at 412. “A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme Court] is, at best, ambiguous.” Mitchell v. Esparza, 540 U.S. 12, 17 (2003).

B. Petitioner's Claims

As grounds for habeas relief, petitioner claims that: (1) the trial court improperly admitted evidence of petitioner’s prior arrests; (2) the trial court improperly admitted propensity evidence; (3) there was insufficient evidence to support petitioner’s burglary conviction; (4) the prosecutor committed misconduct; (5) counsel rendered ineffective assistance by: (a) failing to object to the disposition evidence, and by admitting petitioner’s guilt of receiving stolen property; (b) failing to object to evidence of petitioner’s palm-print or retain an expert; and (c) failing to raise jury instruction errors; and (6) cumulative error denied petitioner a fair trial.² The Court addresses each claim in turn.

1. Admission of Disposition Evidence

Petitioner claims that the admission of evidence that petitioner had prior arrests was prejudicial because it invited the jury to presume that petitioner was guilty based on the fact that he had previously been arrested.

a. Background

The Court of Appeal considered and rejected this claim as follows:

Appellant’s Prior Arrests

Appellant contends, “The admission of evidence Orr had prior arrests which were part of criminal justice records was prejudicial error since it invited the jury to find him guilty based on disposition evidence.”

The information filed charged appellant with three counts of residential burglary and one count of receiving stolen property. The information also alleged that appellant had two prior strike convictions, two prior serious felony convictions, and two prison prior convictions. (Pen.Code, §§ 667, subds.(b)-(i), 1170.12, 667, subd.(a), 667.5, subd. (b).) Appellant had convictions for burglary, robbery, assault on a police officer, and discharging a firearm. Defense counsel asked the court to

² As a matter of efficiency, the Court has re-numbered and rearranged petitioner’s claims.

1 bifurcate the trial on the prior conviction allegations. Counsel also moved before
2 trial to exclude any evidence of prior bad acts, specific uncharged conduct, or
3 evidence of the convictions. The trial court granted these motions, saying, “Unless
it's brought to my attention first, there will be no mention of any type of character
evidence. . . .”

4 The prosecution called Genevieve Rodriguez to testify as a fingerprint expert. The
5 prosecutor asked Rodriguez to describe how the Automated Fingerprint
6 Identification System (AFIS) identified candidates as potential fingerprint matches.
7 She explained that the latent print that the police want matched is scanned to
8 determine points of identification. That print information is then entered into the
9 AFIS for comparison with prints stored there. The prosecutor asked, “so then are
all of the fingerprint items that the San Jose Police Department has, are they all in
this machine as well, the known files?” Rodriguez answered “yes” and said that
there were “Hundreds of thousands of prints in there.” Rodriguez testified that
when the latent print from the Mai burglary was entered into the AFIS for
comparison, a list was generated. The prosecutor asked, “who was the first person
listed on that list?” Rodriguez answered, “We have what we call personal file
numbers. They are called PFN numbers. So the first time you are arrested in the
county, you are assigned a PFN number, or personal file number. So that’s what
our fingerprint cards are filed under. . . . Also, if you are arrested, you’re [given] a
booking number or CEN number, which is a CJIC event number. So for whatever
you’re arrested for, you get a particular arrest number. [¶] So under your personal
file number, you may have one arrest, two arrests, three arrests. It’s just another
number for every time you get arrested” The prosecutor asked two more
questions about the difference between a PFN, which is “the same for an
individual, even if that individual used a different name at different times when
they were arrested” and the CEN number, which “would be different for every
single arrest.” Asking about the result list from the entry of the latent print
information into the AFIS, the prosecutor asked, “what was the PFN number that
was in the number one slot?” Defense counsel objected on relevance grounds and
the objection was overruled. Rodriguez went on to testify, after another overruled
relevance objection and an unreported sidebar conference, that appellant’s PFN
number appeared twice on the list, associated with two names, Tyne Rogers and
Taylon Orr. [FN1]

21 FN1. The trial court said, “Specifically, this is relevant for foundational
22 purposes.”

23 Rodriguez then went on to testify that she compared the latent print from the Mai
24 burglary to the prints on appellant’s cards and that “Tyne Rogers/Taylon Orr [was]
the person who left that print.” She said that two other fingerprint examiners had
25 reached the same conclusion. She also testified that she compared the prints taken
of appellant when he was arrested in this case to the “print cards that [she] used to
26 identify the person who left the latent print” and that they matched.

27 In closing argument, the prosecutor compared the AFIS to the search engine
28 Google. She said that AFIS does not keep the records by name because “somebody

1 who is being arrested could give any name.” She said, “In this case, the first two
 2 entries on that list were for CEN number CNL989, person with the date of birth
 3 8/15/70. There were two names that had been used by this person in prior arrests;
 4 Tyne Roger [sic] and Taylon Orr.”

5 Appellant contends that the trial court erred in admitting evidence over counsel’s
 6 relevance objections. [FN2] He argues that, “In this manner, the prosecutor
 7 successfully disclosed to the jury that Orr had prior criminal arrests, even though
 8 the court had excluded such evidence.”

9 FN2. Respondent contends that “the present claim is barred by trial
 10 counsel’s failure to interpose a timely objection to the disputed testimony.”
 11 However, trial counsel moved before trial to exclude such evidence and the
 12 court ruled that such evidence could not be admitted without first bringing it
 13 to the court’s attention. When the prosecutor elicited this testimony,
 14 defense counsel objected that evidence about appellant’s PFN numbers
 15 based on prior arrests was irrelevant. We therefore address this issue on the
 16 merits.

17 “Evidence that involves crimes other than those for which a defendant is being tried
 18 is admitted only with caution, as there is the serious danger that the jury will
 19 conclude that defendant has a criminal disposition and thus probably committed the
 20 presently charged offense. [Citations.]” (People v. Thompson (1988) 45 Cal.3d
 21 86, 109.) In People v. Stinson (1963) 214 Cal. App. 2d 476, the defendant was
 22 convicted of second degree burglary. The defendant and another individual had
 23 been stopped driving a vehicle which contained items stolen from the room of a
 24 motel. During cross-examination, a police officer gave a non-responsive answer to
 25 a question which referred to the defendant’s status as a parolee. The defense
 26 counsel requested that the answer be stricken and moved for a mistrial. The motion
 27 for a mistrial was denied. The appellate court first noted that the reference to the
 28 defendant’s status as a parolee carried “the inevitable implication of a prior
 criminal record.” (Id. at p. 481.) It further noted “the possible tendency on the part
 of some jurors to convict a defendant not on proof that he committed the offense
 but because he has a criminal past.” (Id. at p. 480.) The court concluded that the
 reference to the defendant’s parole status was reversible error. The court also noted
 that its conclusions were the same regardless of whether the witness’s reference to
 the defendant’s parole status was an accident or intentional. Other references to a
 defendant’s criminal past have also been found to be prejudicial. In People v..
 Ozuna (1963) 213 Cal. App. 2d 338, 342, the court found reversible error when the
 defendant was referred to as an “ex-convict.” In People v. Figuieredo (1955) 130
 Cal. App. 2d 498, 505-506, the court found reversible error when a witness stated
 that the defendant “did time.”

Respondent argues that “the fingerprint expert merely described the process by
 which the Automated Fingerprint Identification System identified appellant. This
 was not improper evidence of criminal disposition.” Respondent relies on People
 v. Farnam (2002) 28 Cal.4th 107. In Farnum, the defendant argued that the
 fingerprint expert’s testimony “that felons convicted of homicide, rape, robbery,
 and burglary were among those included in the database in effect disclosed his

1 prior felon status to the jury and implied he had been previously convicted of those
2 particular crimes.” (Id. at p. 161.) The Supreme Court upheld the admission of this
3 testimony, because the expert “made no mention of past crimes defendant
4 committed or was alleged to have committed.” (Ibid.) Farnum is distinguishable
5 from this case because here the expert testified that the database was composed
6 entirely of arrestees’ fingerprints, where in Farnum, the expert made clear “that the
7 database also included nonfelons such as job applicants who required background
8 clearance.” (Ibid.)

9 The original source of appellant’s fingerprints which were compared to the latent
10 palm print from the Mai burglary, and the fact that appellant had used a different
11 name in one of the prior arrests, were irrelevant to the issues in this trial and should
12 have been excluded. [FN3] Ultimately, here, the question is whether it is
13 reasonably probable that the jury would have reached a result more favorable to
14 appellant had it not heard evidence of appellant’s prior arrests. (People v. Watson
15 (1956) 46 Cal.2d 818, 836.) “There is a reasonable probability of a more favorable
16 result within the meaning of Watson when there exists ‘at least such an equal
17 balance of reasonable probabilities as to leave the court in serious doubt as to
18 whether the error affected the result.’ [Citation.]” (People v. Mower (2002) 28
19 Cal.4th 457, 484.)

20 FN3. Appellant argues that because the trial court bifurcated the trial on the
21 prior conviction allegations, granted defense counsel’s pre-trial motion to
22 exclude any evidence of prior bad acts, specific uncharged conduct, or
23 evidence of the convictions, and said that “any type of character evidence”
24 should be brought to the court’s attention before being mentioned, “the
25 circumstances suggest the disclosure of this evidence was calculated.”

26 Such an equal balance of reasonable probabilities is not present here. The evidence
27 which should have been excluded was concerning prior arrests. It did not inform
28 the jury that appellant had been convicted of any offense, was on probation or
parole, or had served a sentence. Appellant was convicted of the burglary count for
which there was fingerprint evidence. The California Supreme Court has
repeatedly emphasized that fingerprints are the strongest evidence of identity and
ordinarily are sufficient by themselves to identify the perpetrator of the crime.
[FN4] (People v. Figueroa (1992) 2 Cal. App. 4th 1584, 1587-1588.) Considerable
doubt was cast on the accuracy of appellant’s alibi witnesses’ recall of the date of
the event about which they testified. The evidence on the receiving stolen property
count was very strong. However, despite appellant’s possession of numerous items
of stolen property, some of which had been taken in burglaries that had occurred
within days of his arrest, the jury acquitted him of two residential burglary counts.
This was a great success for the defense and indicates that the admission of the
evidence of appellant’s prior arrests did not prejudice the jury against appellant. It
is not reasonably probable that the jury would have reached a result more favorable
to appellant had it not heard evidence of appellant’s prior arrests.

29 FN4. But see Koehler, Fingerprint Error Rates and Proficiency Tests: What
30 They Are and Why They Matter (2008) 59 Hastings L.J. 1077.

1 Orr, 2009 WL 1816665 at *2-5.

2 b. Analysis

3 A state court's evidentiary ruling is not subject to federal habeas review unless the ruling
4 violates federal law, either by infringing upon a specific federal constitutional or statutory
5 provision or by depriving the defendant of the fair trial guaranteed by due process. Pulley v.
6 Harris, 465 U.S. 37, 41 (1984); Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991).
7 Failure to comply with state rules of evidence is neither a necessary nor a sufficient basis for
8 granting federal habeas relief on due process grounds. Henry v. Kernan, 197 F.3d 1021, 1031 (9th
9 Cir. 1999); Jammal, 926 F.2d at 919. While adherence to state evidentiary rules suggests that the
10 trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even
11 when state standards are violated. Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983). The
12 due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or
13 so prejudicial that it rendered the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355,
14 1357 (9th Cir. 1995). But only if there are no permissible inferences that the jury may draw from
15 the evidence can its admission violate due process. See Jammal, 926 F.2d at 920.

16 As an initial matter, respondent correctly points out that petitioner does not state a federal
17 claim. Petitioner neither cites to federal law nor alleges that his claim violates a federal
18 constitutional guarantee. The Supreme Court has repeatedly held that federal habeas relief is
19 unavailable for violations of state law or for alleged error in the interpretation or application of
20 state law. See Swarthout v. Cooke, 131 S. Ct. 859, 861-62 (2011). In other words, "it is only
21 noncompliance with federal law that renders a State's criminal judgment susceptible to collateral
22 attack in the federal courts." Wilson v. Corcoran, 131 S. Ct. 13, 16 (2010) (emphasis in original).
23 Thus, because petitioner did not explicitly claim that any federal constitutional right was violated,
24 petitioner is not entitled to federal habeas relief on this claim.

25 Even assuming that petitioner properly alleged a violation of his federal right to due
26 process, the state court's rejection of it was not contrary to, or an unreasonable application of,
27 clearly established Supreme Court law. That is, the Supreme Court "has not yet made a clear
28 ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process

1 violation sufficient to warrant issuance of the writ.” Holley v. Yarborough, 568 F.3d 1091, 1101
2 (9th Cir. 2009) (finding that trial court’s admission of irrelevant pornographic materials was
3 “fundamentally unfair” under Ninth Circuit precedent but not contrary to, or an unreasonable
4 application of, clearly established Federal law under § 2254(d)).

5 Moreover, the California Court of Appeal determined that the admission that petitioner had
6 suffered prior arrests was not prejudicial. Indeed, the Court of Appeal reasoned that petitioner was
7 acquitted of two out of the three burglary charges, and was only convicted of the burglary charge
8 in which petitioner’s fingerprints were identified. Further, petitioner was convicted of the charge
9 of receiving stolen property after the jury heard evidence that such property was found in
10 petitioner’s possession. Thus, even if the testimony that petitioner had suffered prior arrests were
11 excluded, it did not have a substantial or injurious effect on the jury’s verdict. See Brecht v.
12 Abrahamson, 507 U.S. 619, 637 (1993).

13 2. Admission of Propensity Evidence

14 Relatedly, petitioner also claims that the admission of evidence that petitioner had prior
15 arrests violated his federal right to due process because it was irrelevant, prejudicial, and implied
16 that petitioner had a criminal propensity. As the Court stated above, the question is whether the
17 admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally
18 unfair. Walters, 45 F.3d at 1357. For the reasons already stated, the answer is no. Moreover,
19 even if the admission was constitutionally erroneous, for the reasons stated above, it did not have a
20 substantial or injurious effect on the jury. The state court’s rejection of this claim was not contrary
21 to, or an unreasonable application of, clearly established Supreme Court law. See 28 U.S.C §
22 2254(d); Holley v. Yarborough, 568 F.3d at 1101.

23 3. Sufficiency of the Evidence

24 Petitioner claims the trial court violated his right to due process because there was
25 insufficient evidence to find him guilty of the burglary of Simon Mai’s house. Petitioner appears
26 to argue that because defense witnesses testified that petitioner was at a football game in Morgan
27 Hill the night of the burglary, the evidence regarding the specific location of petitioner’s palm
28

1 print was conflicting, and the police failed to preserve or photograph the latent palm print, the
2 evidence was not sufficient to convict him of burglary.

3 The Due Process Clause “protects the accused against conviction except upon proof
4 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
5 charged.” In re Winship, 397 U.S. 358, 364 (1970). A federal court reviewing collaterally a state
6 court conviction does not determine whether it is satisfied that the evidence established guilt
7 beyond a reasonable doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992); see, e.g., Coleman
8 v. Johnson, 132 S. Ct. 2060, 2065 (2012) (per curiam) (“the only question under Jackson [v.
9 Virginia] is whether [the jury’s finding of guilt] was so insupportable as to fall below the threshold
10 of bare rationality”). Rather, the federal court “determines only whether, ‘after viewing the
11 evidence in the light most favorable to the prosecution, any rational trier of fact could have found
12 the essential elements of the crime beyond a reasonable doubt.’” Payne, 982 F.2d at 338 (quoting
13 Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Only if no rational trier of fact could have found
14 proof of guilt beyond a reasonable doubt, has there been a due process violation. Id. at 324. If
15 confronted by a record that supports conflicting inferences, a federal habeas court “must presume
16 – even if it does not affirmatively appear in the record – that the trier of fact resolved any such
17 conflicts in favor of the prosecution, and must defer to that resolution.” Id. at 326.

18 Petitioner’s argument is nothing more than an attempt to persuade this Court that his
19 version of the facts is the more believable. Based on the palm print identified as belonging to
20 petitioner by three different fingerprint experts, and discovered on a television stand inside Simon
21 Mai’s residence, and testimony of other witnesses, any rational trier of fact could have found that
22 petitioner entered a dwelling belonging to Simon Mai without Simon Mai’s permission with the
23 intent to commit a crime beyond a reasonable doubt. See Payne, 982 F.2d at 338; see, e.g., Taylor
24 v. Stainer, 31 F.3d 907, 910 (9th Cir. 1994) (three hypotheses regarding petitioner’s fingerprints
25 which government failed to rebut were unsupported by evidence and therefore insufficient to
26 invalidate conviction).

27 Petitioner is not entitled to federal habeas relief on this claim.
28

4. Prosecutorial Misconduct

Petitioner claims that the prosecution failed to collect and preserve physical evidence showing where petitioner's palm print was found. Petitioner also alleges that the prosecutor improperly vouched for a witness by telling the jury that petitioner's palm print was found on the glass table.

As an initial matter, the parties appear to analyze this claim under Brady v. Maryland, 373 U.S. 83 (1963). Brady applies when the prosecution suppresses evidence favorable to an accused and that evidence is material either to guilt or punishment. Id. at 87. In order to succeed on a Brady claim, a petitioner must show: (1) that the evidence at issue is favorable to the accused, either because it is exculpatory or impeaching; (2) that it was suppressed by the prosecution, either willfully or inadvertently; and (3) that it was material (or, put differently, that prejudice ensued). Banks v. Dretke, 540 U.S. 668, 691 (2004). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Cone v. Bell, 556 U.S. 449, 469-70 (2009). Here, Officer Chan testified that he lifted a partial hand print from the glass top of the television stand. Petitioner disputes that there was "proof" that Officer Chan did so. This argument is insufficient to state a Brady claim because Petitioner fails to identify any *suppressed* evidence that was favorable or material.

Petitioner's argument is more accurately characterized as alleging a failure to preserve potentially useful evidence. Illinois v. Fisher, 540 U.S. 544, 547-48 (2004). To the extent petitioner is arguing that the prosecution had a duty to preserve or collect a photograph of the table top where petitioner's palm print was lifted, petitioner must demonstrate bad faith conduct by the police in failing to preserve potentially useful evidence. Id. at 547-48. A constitutional violation will be found only if a showing is made that (1) the government acted in bad faith, the presence or absence of which turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed, and (2) that the missing evidence is "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. (internal quotation and citation omitted). See, e.g., id. at 547-48 (no bad faith failure to preserve substance seized from defendant which had been tested four times and determined to

1 be cocaine – the substance was only potentially useful evidence because defendant at most could
 2 hope that he could conduct another test that might show the substance to not be cocaine); United
 3 States v. Estrada, 453 F.3d 1208, 1212-13 (9th Cir. 2006) (no bad faith in part because there was
 4 no evidence of “malicious intent” by government); United States v. Booth, 309 F.3d 566 at 574
 5 (9th Cir. 2002) (no bad faith failure to preserve where government did not take possession of
 6 computer hard drives but only informed third party vendor (who later erased them) that it did not
 7 need copies of the information on the hard drives and where there was nothing about the hard
 8 drives that would have made their allegedly exculpatory nature apparent to the government).
 9 Here, there was no evidence that Officer Chan knew that photographing the location of the found
 10 palm print could have had any potential exculpatory value, or that the failure to obtain such
 11 information was not available by other means. Indeed, Officer Chan plainly testified that he found
 12 the print on the glass table. Petitioner thus cannot demonstrate either factor necessary to show a
 13 violation under Fisher. Fisher, 540 U.S. at 547-48.

14 Finally, petitioner alleges that the prosecutor improperly vouched for his witness’
 15 credibility by telling the jury that petitioner’s palm print was found on Simon Mai’s table. A
 16 prosecutor may not vouch for the credibility of a witness. United States v. Moreland, 604 F.3d
 17 1058, 1066 (9th Cir. 2010); United States v. Lopez, 803 F.2d 969, 973 (9th Cir. 1986) (improper
 18 to suggest that witness found credible by the grand jury should therefore be credible to the trial
 19 jury). Improper vouching for the credibility of a witness occurs when the prosecutor places the
 20 prestige of the government behind the witness or suggests that information not presented to the
 21 jury supports the witness’ testimony. United States v. Young, 470 U.S. 1, 7 n.3, 11-12 (1985).
 22 Here, in contrast, Officer Chan clearly testified in front of the jury that he lifted petitioner’s palm
 23 print from the glass television stand. (Ex. B at 114.) Thus, the prosecutor’s restatement of that
 24 testimony during closing argument was not improper vouching and did not violate petitioner’s
 25 constitutional right to due process.

26 The state court’s rejection of petitioner’s prosecutorial misconduct claim was not contrary
 27 to, or an unreasonable application of, clearly established Supreme Court law.
 28

1 5. Ineffective Assistance of Counsel

2 Petitioner argues that trial counsel rendered ineffective assistance of counsel by (a) failing
3 to object to the disposition evidence, and by admitting petitioner's guilt of receiving stolen
4 property and (b) failing to object to evidence of petitioner's palm-print or retain an expert.
5 Petitioner also argues that trial and appellate counsel rendered ineffective assistance by failing to
6 raise claims regarding jury instruction errors.

7 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth
8 Amendment right to counsel, which guarantees not only assistance, but "effective" assistance of
9 counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to prevail on a Sixth
10 Amendment claim based on ineffectiveness of counsel, a petitioner first must establish such
11 counsel's performance was deficient, i.e., that it fell below an "objective standard of
12 reasonableness" under prevailing professional norms. Id. at 687-88. Second, the petitioner must
13 establish prejudice resulting from his counsel's deficient performance, i.e., that "there is a
14 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
15 would have been different." Id. at 694. "A reasonable probability is a probability sufficient to
16 undermine confidence in the outcome." Id.

17 The Strickland framework for analyzing ineffective assistance of counsel claims is
18 considered to be "clearly established Federal law, as determined by the Supreme Court of the
19 United States" for the purposes of 28 U.S.C. § 2254(d) analysis. See Cullen v. Pinholster, 131 S.
20 Ct. 1388, 1403 (2011). A "doubly" deferential judicial review is appropriate in analyzing
21 ineffective assistance of counsel claims under § 2254. See id. at 1410-11; Harrington v. Richter,
22 131 S. Ct. 770, 788 (2011) (same). The general rule of Strickland, i.e., to review a defense
23 counsel's effectiveness with great deference, gives the state courts greater leeway in reasonably
24 applying that rule, which in turn "translates to a narrower range of decisions that are objectively
25 unreasonable under AEDPA." Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010) (citing
26 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). When § 2254(d) applies, "the question is not
27 whether counsel's actions were reasonable. The question is whether there is any reasonable
28 argument that counsel satisfied Strickland's deferential standard." Harrington, 131 S. Ct. at 788.

1 a. Failing to object to disposition evidence

2 Petitioner claims that although counsel objected to evidence of petitioner's prior arrests as
3 irrelevant, counsel failed to object on the ground that the evidence was more prejudicial than
4 probative. In addition, petitioner argues that counsel failed to object to the use of the Automated
5 Fingerprint Identification System ("AFIS") as irrelevant and more prejudicial than probative.

6 i. Background

7 The Court of Appeal considered and rejected this claim as follows:

8 Appellant contends, "The admission of evidence that a search of a computer
9 database identified appellant as the likely source of the palm print found at the Mai
10 residence should have been excluded since it was irrelevant, and counsel provided
ineffective assistance in failing to move to exclude that evidence on relevance
grounds prior to the fingerprint expert's testimony."

11 Before the fingerprint examiner testified, defense counsel asked the trial court to
12 hold an Evidence Code section 402 hearing concerning the reliability of the "AFIS
13 machine." Counsel observed that the AFIS listed 15 possible matches. He said,
14 "we need to know if there are misattributed identities in the AFIS system
potentially among the 15 possible candidates that were not-that were not
15 investigated, to know if there possibly could have been other close matches that
could have resulted in a second layer of analysis from a supervising latent print
16 examiner to rule out other people." Counsel had asked the prosecutor to produce
logs concerning the maintenance of the machine. He said that his investigation had
17 "recently turned up to issues relative to the AFIS machine that were striking to us"
and argued, "If this machine is not in proper working order the time it was being
18 used in the examination, then . . . that would be exculpatory." The prosecutor said
that there were no maintenance records available because "any sort of maintenance
19 or anything to this system" is performed by "Motorola engineers who have remote
access to this system."

20 The trial court denied appellant's request for an Evidence Code section 402 hearing
21 saying, "I get the impression that proper foundation will be able to be laid" by
22 Rodriguez in her testimony. When Rodriguez testified, defense counsel cross-
23 examined her extensively on the AFIS system, causing her to acknowledge that she
did not know the "error rate at which it turns up incorrect lists of possible
24 identification matches" and that she was not familiar with a case counsel mentioned
by name in which "the AFIS machine mistakenly matched a California man[s]
25 print to a three-time felon."

26 "In order to demonstrate ineffective assistance, a defendant must first show
27 counsel's performance was deficient because the representation fell below an
objective standard of reasonableness under prevailing professional norms.
28 (Strickland v. Washington (1984) 466 U.S. 668, 687-688. . . .) Second, he must
show prejudice flowing from counsel's performance or lack thereof. Prejudice is

1 shown when there is a reasonable probability that, but for counsel's unprofessional
2 errors, the result of the proceeding would have been different. A reasonable
3 probability is a probability sufficient to undermine confidence in the outcome. (In
re Avena (1996) 12 Cal.4th 694, 721. . . .)" (People v. Williams (1997) 16 Cal.4th
153, 215.)

4 "If 'counsel's omissions resulted from an informed tactical choice within the range
5 of reasonable competence, the conviction must be affirmed.' [Citation.] When,
6 however, the record sheds no light on why counsel acted or failed to act in the
7 manner challenged, the reviewing court should not speculate as to counsel's
8 reasons. To engage in such speculations would involve the reviewing court "'in the
9 perilous process of second-guessing.'" [Citation .] Because the appellate record
10 ordinarily does not show the reasons for defense counsel's actions or omissions, a
11 claim of ineffective assistance of counsel should generally be made in a petition for
12 writ of habeas corpus, rather than on appeal. [Citation.]" (People v. Diaz (1992) 3
Cal.4th 495, 557-558.) If the record on appeal fails to show why counsel acted or
13 failed to act in the instance asserted to be ineffective, unless counsel was asked for
14 an explanation and failed to provide one, or unless there simply could be no
15 satisfactory explanation, the claim must be rejected on appeal. (People v. Mendoza
Tello (1997) 15 Cal.4th 264, 266-267; People v. Kraft (2000) 23 Cal.4th 978, 1068-
1069.)

16 The failure to object is considered a matter of trial tactics "as to which we will not
17 exercise judicial hindsight. [Citation.]" (People v. Kelly (1992) 1 Cal.4th 495,
520.) We defer to counsel's tactical decisions in examining ineffective assistance
18 claims and there is a "strong presumption that counsel's conduct falls within the
19 wide range of reasonable professional assistance; that is, the defendant must
20 overcome the presumption that, under the circumstances, the challenged action
21 'might be considered sound trial strategy.' [Citation.]" (Strickland v. Washington,
supra, 466 U.S. 668, 689; People v. Lucas (1995) 12 Cal.4th 415, 436-437.)

22 The admission of evidence that a search of the AFIS database identified appellant
23 as the likely source of the palm print permitted counsel to challenge, through cross
24 examination, the reliability of that database and the examiner's comparison of only
25 one set from the matches produced by the AFIS. This line of questioning was
26 designed to cast doubt on the value of the examiner's determination that appellant's
27 prints matched the latent palm print found at the scene of the Mai burglary.
28 Counsel clearly made a decision to do this, and we cannot say that this was an
unreasonable tactical choice.

Orr, 2009 WL 1816665, *6-7.

ii. Analysis

Applying the state court's analysis, this Court cannot say that the state court's conclusion
that counsel made a tactical decision was an unreasonable determination of the facts. See Edwards
v. LaMarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (recognizing that whether counsel's

actions were tactical is a question of fact considered under 28 U.S.C. § 2254(d)(2); whether those actions were reasonable is a question of law considered under 28 U.S.C. § 2254(d)(1)). Nor can this Court say that such a tactical decision to refrain from objecting was objectively unreasonable. See, e.g., United States v. Gibson, 690 F.2d 697, 703-04 (9th Cir. 1982) (failure to make evidentiary objections does not render assistance ineffective unless challenged errors can be shown to have prejudiced the defense). Moreover, based on this Court's determination in Section 1, supra, even if counsel's failure to object was erroneous, there is no indication that such error had a substantial or injurious effect on the jury's verdict.

b. Conceding that petitioner was guilty of receiving stolen property

Petitioner states that counsel rendered ineffective assistance by conceding in opening statements that petitioner was guilty of the count of receiving stolen property.

i. Background

Appellant contends, "Trial counsel provided ineffective assistance of counsel . . . by admitting in opening statement Orr was guilty of receiving stolen property." In his opening statement, defense counsel said that the police "found some stolen property on Mr. Orr when they searched his car: laptop, some cell phones. We admit that. This is a receiving stolen property case. Mr. Orr doesn't necessarily keep the best company, but the burglary cases, the charges of burglary in this case are a not guilty. That's what you're going to find."

In closing argument, the prosecutor noted that "in opening statement, the defense indicated that they were conceding that count that the defendant did possess stolen property, and they weren't going to deny that. Now, attorney statements are not evidence, but that's what you were told, so this is an undisputed fact."

In defense counsel's closing argument, he discussed some of the property that was found in appellant's car. He mentioned the laptop computer and challenged the prosecution's view that the serial number on it had been obliterated. He noted that the owner's business card was still attached to the laptop. He said that the prosecution "wants you to believe that Mr. Orr knew that this was stolen because If he had possessed it, that means he stole it" He said, "Now, I know -- I know I said this, and I honestly, I don't feel too good about it, you know. I said at the beginning of this case this is a . . . receiving stolen property case. I wish I hadn't of said that because I heard testimony that changes my opinion."

1 As appellant sees it, “When [defense counsel] attempted to retract his concession,
2 counsel admitted his performance fell below the standard of reasonable conduct by
a defense attorney.”

3 It is not ineffective assistance of counsel to admit obvious weaknesses in a defense
4 case. (People v. Mayfield (1993) 5 Cal.4th 142, 177.) While “a defense attorney’s
5 concession of his client’s guilt . . . can constitute ineffectiveness of counsel,” there
6 may be times when it would be a reasonable trial tactic to “adopt[] a more realistic
7 approach” and concede some facts. (People v. Gurule (2002) 28 Cal.4th 557, 611,
8 612; People v. Diggs (1986) 177 Cal. App. 3d 958, 970.) There is a strong
9 presumption that counsel’s actions were based on sound trial strategy, even when
10 counsel concedes some degree of guilt. (People v. Freeman (1994) 8 Cal.4th 450,
498.) Where evidence of guilt is quite strong, it is understandable that trial counsel,
given the weight of incriminating evidence, would not make sweeping declarations
of the defendant’s innocence but instead would adopt a more realistic approach.
Good trial tactics may depend on complete candor with the jury. (People v. Gurule,
supra, 28 Cal.4th at p. 612.)

11 Appellant argues, “Since counsel confessed he should not have conceded Orr’s
12 guilt in opening statement, the record indicates counsel did not make a reasonable
13 tactical decision.” We disagree. Under the circumstances, it was a reasonable
14 tactical decision to admit that appellant had received stolen property in that so
15 much of it was found with him in his car and in his home. In this way, counsel
16 could hope to achieve some credibility with the jury. We view counsel’s remark in
17 closing argument that he wished he had not made the concession as a rhetorical
device, rather than an admission of ineffective assistance. Counsel was making the
point that the prosecutor had failed to convincingly prove even that count in order
to argue that the rest of the prosecution’s case contained even greater weaknesses.
This was a reasonable tactical choice and appellant was acquitted of two counts of
residential burglary as a result.

18 Orr, 2009 WL 1816665, *7-8.

19
20 In Florida v. Nixon, 543 U.S. 175 (2004), defense counsel conceded that defendant
21 committed the charged crime of murder during the guilt phase of trial, and decided to concentrate
22 instead on minimizing defendant’s punishment during the penalty phase of trial because the
23 evidence of guilt was overwhelming. The Supreme Court recognized that, “[a] defendant . . . has
24 the ultimate authority to determine whether to plead guilty, waive a jury, testify in his or her own
25 behalf, or take an appeal. Concerning those decisions, an attorney must both consult with the
26 defendant and obtain consent to the recommended course of action.” Nixon, 543 U.S. at 187
27 (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983) (internal quotation marks omitted). However,
28

continued the Supreme Court, in Nixon, prejudice is not presumed unless defense counsel “failed to function in any meaningful sense as the Government’s adversary.” Id. (quoting United States v. Cronin, 466 U.S. 648, 666 (1984)).

Here, it was not objectively unreasonable for the state court to conclude that defense counsel’s decision to concede guilt on the count of receiving stolen property during opening statements in order to build credibility with the jury was a tactical strategy. See United States v. Thomas, 417 F.3d 1053, 1058-59 (9th Cir. 2005) (“in some cases a trial attorney may find it advantageous to his client’s interests to concede certain elements of an offense or his guilt of one of several charges”) (citation omitted); United States v. Holman, 314 F.3d 837, 839 n.1, 840-41 (7th Cir. 2002) (holding that trial counsel’s concession of defendant’s guilt to one of several charges in order to enhance his credibility in arguing against conviction on other charges is a reasonable trial strategy). Moreover, due to the fact that the stolen property was ultimately found in petitioner’s vehicle and house, there is no reasonable probability that the result of the proceeding would have been different had counsel not conceded guilt of receiving stolen property during his opening statement.

c. Failure to object to palm-print or retain an expert

Petitioner argues that counsel should have moved to exclude the evidence of petitioner’s palm-print because there was no photograph of the location from where the palm-print was lifted. Despite petitioner’s insistence that Officer Chan testified that the palm-print was found on the left-hand side of the glass television stand and Simon Mai testified that the palm-print was on the front of the glass television stand, petitioner does not explain how this discrepancy would be grounds upon which to exclude evidence of the palm-print. Trial counsel cannot have been ineffective for failing to raise a meritless motion. Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005); see, e.g., Hebner v. McGrath, 543 F.3d 1133, 1137 (9th Cir. 2008) (finding counsel’s failure to object

1 to admission of defendant's prior sexual misconduct as propensity evidence not ineffective where
2 evidence would have been admitted in any event to show common plan or intent).

3 Petitioner also claims that counsel should have hired an expert to challenge the authenticity
4 of the palm-print. Counsel's failure to call an expert witness can be grounds for an ineffective
5 assistance of counsel claim. See Schell v. Witek, 218 F.3d 1017, 1028-29 (9th Cir. 2000) (counsel
6 failed to solicit fingerprint expert where only evidence against defendant was a fingerprint). But
7 courts have found that a trial counsel's strategic decision to forgo calling an expert and to instead
8 rely on cross-examination of the prosecution's witness does not render counsel ineffective. See
9 Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) (where the evidence does not warrant it, the
10 failure to call an expert does not amount to ineffective assistance of counsel). And, even if
11 counsel's failure to consult and present expert testimony was unreasonable, petitioner must show
12 that such failure prejudiced his case. See Richter v. Hickman, 521 F.3d 1222, 1230-32 (9th Cir.
13 2008).

14
15 Here, defense counsel opted to challenge the reliability of the AFIS database as
16 well as the examiner's methods through cross-examination. This Court cannot say that counsel's
17 tactic was unreasonable. In addition, petitioner merely speculates as to the expert testimony that
18 could have been produced, but "[s]peculation about what an expert could have said is not enough
19 to establish prejudice." Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997). Accordingly, this
20 Court concludes that the decision of petitioner's counsel to forego calling an expert did not render
21 his assistance ineffective.
22

23
24 d. Failure of trial and appellate counsel to raise jury instruction errors

25 Petitioner claims that counsel was ineffective for failing to request: (a) CALCRIM No.
26 3400 (Alibi)³; (b) instructions on lesser included offenses of burglary; and (c) CALCRIM Nos.

27
28 ³ CALCRIM No. 3400 provides: The People must prove that the defendant committed <insert
crime[s] charged>. The defendant contends (he/she) did not commit (this/these) crime[s] and that

1751 (Defense to Receiving Stolen Property: Innocent Intent)⁴ and 3406 (Mistake of Fact)⁵.

Petitioner further claims that appellate counsel was ineffective for failing to raise these omissions on appeal.

i. CALCRIM No. 3400

But for counsel's failure to request CALCRIM No. 3400, the result of the proceeding would not have been different. Here, counsel's failure to request the alibi instruction could not have been prejudicial in light of the facts of the case and the other instructions given to the jury. With respect to the Mai burglarly conviction, counsel called several witnesses who testified that petitioner was at a football game in Morgan Hill the night of the burglary. Additionally, counsel argued at the close of trial that the prosecution's witnesses should not be believed, and that petitioner was not present at the scene of the crime. (Ex. B at 475-86.) Moreover, the trial court instructed the jury on how to weigh the credibility of a witness (*id.* at 434), on the presumption of petitioner's innocence (*id.* at 431), and on the prosecution's burden of proving petitioner guilty beyond a reasonable doubt (*id.*). The jury nevertheless determined that there was neither

(he/she) was somewhere else when the crime[s] (was/were) committed. The People must prove that the defendant was present and committed the crime[s] with which (he/she) is charged. The defendant does not need to prove (he/she) was elsewhere at the time of the crime.

If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find (him/her) not guilty.

⁴ CALCRIM No. 1751 provides: The defendant is not guilty of receiving (stolen/extorted) property if (he/she) intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) the property.

If you have a reasonable doubt about whether the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) the property, you must find (him/her) not guilty of receiving (stolen/extorted) property.

⁵ CALCRIM No. 3406 provides: The defendant is not guilty of <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit <insert crime[s]>.

If you find that the defendant believed that <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for <insert crime[s]>.

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for <insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes).

1 exculpatory information nor any evidence that raised a reasonable doubt of petitioner's guilt.
 2 Thus, the state court's conclusion that there was no reasonable probability that counsel's failure to
 3 request CALCRIM No. 3400 affected the jury's verdict (or that appellate counsel was ineffective
 4 for failing to raise such a claim) was not contrary to, or an unreasonable application of, clearly
 5 established Supreme Court law.

6 ii. Lesser-included offenses

7 As respondent points out, counsel's decision not to request instructions on lesser-included
 8 offenses of burglary was a tactical and reasonable decision. The theory of defense was that
 9 petitioner was not present at the time of the burglaries. Requesting an instruction on lesser-
 10 included offenses would have been contrary to such a theory.

11 It cannot be said that counsel's decision did not "reflect[] the skill and judgment one
 12 would expect of a reasonably competent attorney." Denham v. Deeds, 954 F.2d 1501, 1505 (9th
 13 Cir. 1992). Specifically, because either any lesser included instruction of burglary would have
 14 been inconsistent with the defense theory of factual innocence, it cannot be said that defense
 15 counsel had no rational tactical purpose for deciding not to request such an instruction.
 16 Additionally, defense counsel could have made the tactical choice to take an "all or nothing"
 17 approach on the greater offense burglary, rather than give the jury the opportunity to convict on
 18 the lesser-included offenses. Counsel's presumed strategic decision not to ask for such instruction
 19 is bolstered by state law: "when a defendant completely denies complicity in the charged crime,
 20 there is no error in failing to instruct on a lesser included offense." People v. Gutierrez, 112 Cal.
 21 App. 4th 704, 709 (2003) (citing People v. Medina, 78 Cal. App. 3d 1000, 1005-1006 (1978)).
 22 Thus, petitioner has not demonstrated his trial counsel was ineffective in failing to request a lesser-
 23 included offense instructions or that appellate counsel was ineffective in failing to so argue.

24 iii. CALCRIM Nos. 1751 and 3406

25 Petitioner argues that counsel should have requested instructions regarding innocent intent
 26 and mistake of fact. However, as respondent points out, there was no evidence to support either
 27 instruction. Petitioner did not testify, and there was otherwise no evidence before the jury that
 28 would have supported what petitioner's state of mind was. Here, petitioner has failed to show that

counsel rendered deficient performance by failing to request such instructions, or that petitioner was prejudiced by such a failure. Accordingly, petitioner's trial counsel was not ineffective for failing to request instructions that would have been denied. See Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance"). Because a request for either instruction would not have been successful due to the lack of supporting evidence, trial counsel was not ineffective in failing to make such a request. Accordingly, the state court's decision was neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts. For the same reasons, petitioner's claim that appellate counsel was ineffective for failing to raise this claim on appeal fails.

7. Cumulative Error

Petitioner claims he was prejudiced by the cumulative effect of the foregoing asserted errors. For the reasons discussed above, the Court has found no constitutional error exists, let alone multiple errors. As there have been no errors to accumulate, there can be no due process violation based on a theory of "cumulative" error. See Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) (holding where there are no errors, there can be no cumulative error).

Accordingly, petitioner is not entitled to habeas relief on this claim.

C. Certificate of Appealability

The federal rules governing habeas cases brought by state prisoners require a district court that issues an order denying a habeas petition to either grant or deny therein a certificate of appealability. See Rules Governing § 2254 Case, Rule 11(a). A judge shall grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Here, petitioner has not made such a showing, and, accordingly, a certificate of appealability will be denied.

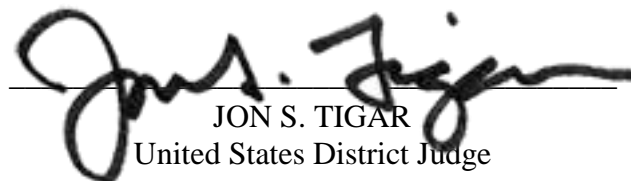
IV. CONCLUSION

For the reasons stated above, the petition for a writ of habeas corpus is DENIED, and a certificate of appealability is DENIED.

The Clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

Dated: January 28, 2014


JON S. TIGAR
United States District Judge